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No. 94-1090

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY, WASHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA AND
KALISPEL TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

ROBERT L. KLARQUIST
ELIZABETH ANN PETERSON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the court of appeals properly found that petitioner's trespass on the Indian trust lands at issue in this case had not been authorized by petitioner's license to operate a hydroelectric facility under the Federal Power Act.

2. Whether the federal courts are ousted of jurisdiction to adjudicate claims for trespass to Indian trust lands because the defendant asserts as a defense that its trespass was authorized by a license under the Federal Power Act to operate a federally licensed hydroelectric facility.

3. Whether the court of appeals improperly reversed any factual finding of the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-25a) is reported at 28 F.3d 1544. The decision of the district court (Pet. App. 33a-46a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1994. A petition for rehearing was denied on September 14, 1994. Pet. App. 1a-3a. The petition for a writ of certiorari was filed on December 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case was brought on March 31, 1980, by the United States as trustee for the Kalispel Indian Tribe and individual Kalispel Indians against petitioner Pend Oreille County Public Utility District No. 1. The complaint sought damages in trespass for unauthorized use of land held by the United States in trust for the Kalispel Tribe and individual Indian allottees, and an injunction to restrain petitioner's continuing trespass. The district court held that petitioner had trespassed on the lands in question and ordered that damages be paid. The court of appeals affirmed the district court's finding that petitioner had committed the trespass, but reversed the district court's calculation of damages and remanded for the district court to recalculate the amount of damages and to consider whether an injunction would be appropriate.

1. Petitioner operates the Box Canyon Dam on the Pend Oreille River in the State of Washington. Petitioner obtained a license for the project from the Federal Power Commission (FPC)—the predecessor of the Federal Energy Regulatory Commission (FERC)—on February 5, 1952, and the dam has been in operation since at least 1956. Pet. App. 33a, 45a.

The Pend Oreille River forms the western boundary of the Kalispel Indian Reservation, approximately 30 miles upstream from the Box Canyon Dam. Pet. App. 6a-7a, 11a. When the FPC was considering whether to issue the license, the Acting Secretary of the Interior wrote a letter to the FPC noting the proximity of the Reservation to the project and stating that "Indian lands and interests on this Reservation will not be adversely affected if backwater from the dam is not allowed to raise the water-surface levels adjacent to Indian lands during

flood flows." *Id.* at 72a. Accordingly, the Acting Secretary recommended that a stipulation be included in the license "to effectuate this provision or to provide for adequate compensation to the Indians in case damage is incurred as the result of the Box Canyon operation." *Ibid.*

As a result, the license ultimately issued to petitioner for the project included Article 33, which provides:

> The project shall be operated by [petitioner] in such a manner as not to interfere with or damage Indian land of the [K]alispel Indian Reservation, or, in case such damage should occur as a result of the operation of the project, the Indians shall be compensated by [petitioner] in the manner and amount as determined by the Secretary of the Interior, after consultation with the [K]alispel Community Council and [petitioner].

Pet. App. 64a.

2. In 1954, petitioner acquired easements to various parcels on the Kalispel Reservation. Pet. App. 36a. The easements were to property lying below 2031.3 feet above mean sea level and permitted petitioner to raise the water at a particular measuring station to a level no higher than 2028 feet above mean sea level. *Ibid.*

Petitioner operated its dam so as to raise the water level above the level for which it had acquired easements. Pet. App. 37a. Moreover, petitioner never acquired easements for all of the Indian lands that were flooded. *Id.* at 39a-40a. Petitioner knew that it was exceeding the easements that it had obtained. *Id.* at 37a. Petitioner attempted to secure additional easements, but their processing was delayed by the Indians and the government. *Id.* at 39a.

3. In 1980, the United States filed this action, alleging that petitioner's flooding of Indian trust lands in excess of that to which petitioner had acquired easements constituted a trespass. The United States sought damages to compensate the Indians for injuries resulting from petitioner's operation of the dam and an injunction to forbid petitioner's continued occupation of that land. The Kalispel Tribe intervened as plaintiff with respect to the trespass claims. Pet. App. 7a.

In its original liability ruling, the district court found that petitioner had trespassed on the lands in question by raising the level of the river. Pet. App. 7a. The court of appeals affirmed that finding, *United States* v. *Pend Oreille Public Utility District No. 1*, 926 F.2d 1502 (9th Cir.), and this Court denied review, 112 S. Ct. 415 (1991).

The district court then conducted proceedings to determine the amount of damages that petitioner should pay, to decide whether injunctive relief would be appropriate, and to resolve other remaining issues. The court calculated the amount of damages on the basis of the value of the flooded land as grazing land, not its value as part of the power project. Pet. App. 7a. The court also refused to grant injunctive relief. *Id.* at 41a. Finally, the district court dismissed a counterclaim filed by petitioner to condemn the land. *Id.* at 7a.

4. The court of appeals again affirmed the district court's conclusion that petitioner had trespassed upon the lands in question, but it reversed the district court's calculation of the amount of damages and remanded for further proceedings on that issue and to determine whether injunctive relief would be appropriate. Pet. App. 4a-25a.

With respect to liability for trespass, petitioner argued that Article 33 of the project license authorized it to flood Reservation land and compensate the Tribe at

the rate that petitioner pays private landowners—the rental value of the property as grazing land. Pet. App. 8a. The court of appeals rejected that argument. The court first noted that, on petitioner's prior appeal, it had rejected petitioner's argument that there was no trespass at all. The court further concluded that, in any event, petitioner's argument based on Article 33 was without merit. The court explained that, if read as petitioner suggested, Article 33 "would authorize the taking of Reservation land by inverse condemnation." *Id.* at 9a. The court explained that, because neither tribal land nor allotted Indian land may be taken by inverse condemnation, that would be an unreasonable reading of Article 33. *Id.* at 9a-10a. The court further explained that, although Article 33 contains an administrative remedy for a violation, "[n]othing indicates creation of this administrative remedy was intended to affect the rights of the Tribe and the United States if they choose instead to file a trespass action in federal court, as they did." *Id.* at 9a.

The court of appeals also held that the district court had erred in calculating damages by reference to state law, which measures damages in cases of this kind as the rental value of the land for grazing purposes. The court of appeals held that the appropriate measure of damages in this case is "the value of the tribal lands as part of the power project." Pet. App. 17a. The court recognized that that conclusion "is not compelled by regulation or case law." *Ibid.* The court nonetheless found it the "most acceptable measure of damages for [petitioner's] trespass," because it was reflected in the governing regulation at an earlier date and because it is "the formulation now applied by [FERC] in fixing annual charges for use of tribal lands on all power projects." *Ibid.* In addition, the court explained that "[i]ts use will

also assure the Tribe will not suffer an uncompensated loss from [petitioner's] past failure to comply with the [Federal] Power Act and will encourage future compliance." *Ibid.* Finally, the court held that the measure of damages it adopted would encourage future compliance with Sections 4(e) and 10(e)(1) of the Federal Power Act, 16 U.S.C. 797(e) and 803(e)(1) (1988 & Supp. V 1993). Pet. App. 18a.

ARGUMENT

1. Petitioner contends (Pet. 14-18) that the court of appeals erred in concluding that Article 33 of petitioner's FPC license did not authorize it to trespass upon Indian trust lands. The court of appeals correctly determined that the FPC license did not purport to authorize any trespass on Indian land. That fact-bound determination does not conflict with any decision of this Court or any other court of appeals.

Article 33 of petitioner's license does not by its terms authorize petitioner to flood Reservation land. To the contrary, it requires petitioner to operate its dam in such "a manner as not to interfere with or damage Indian land of the [K]alispel Indian Reservation." Pet. App. 9a. That language is sufficient in itself to warrant the court of appeals' holding that petitioner had no authority to flood Indian lands without obtaining the necessary easements.

The court of appeals also identified several other reasons why Article 33 should not be interpreted to authorize petitioner to flood Indian lands without obtaining an easement. Each of those reasons reinforces the court's conclusion.

First, interpreting Article 33 to permit petitioner to flood Indian lands would in effect authorize inverse condemnation of such land. This Court held, however, in

United States v. *Clarke*, 445 U.S. 253, 258-259 (1980), that allotted Indian trust lands are not subject to inverse condemnation. Petitioner concedes that much of the land at issue in this case consists of allotted Indian trust lands.[1] Accordingly, petitioner's suggested interpretation of Article 33 is mistaken.[2]

Second, Article 33 could be construed to permit petitioner to flood Indian trust lands only if the FPC were informed that petitioner's project would have that effect before it issued the license and then acted pursuant to its powers under Section 4(e) of the Federal

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[1] Petitioner argues (Pet. 12 n.5, 16, 18 n.6, 22, 25) that the court of appeals erred in concluding that its project trespassed on tribal trust lands, as well as allotted lands. The district court made no findings on that issue, but the record contains evidence that the lands affected by the dam included both tribal and allotted tracts. See C.A. E.R. 85 (affidavit certifying that certain tracts of land at issue were "tribal and individually owned lands held by the United States in trust status"). In any event, nothing in the court of appeals' decision turns on a distinction between tribal and allotted lands.

[2] Petitioner argues (Pet. 29) that *United States* v. *Clarke* should be overruled, on the ground that it is "an inappropriate limitation on the eminent domain rights of persons under state law." Pet. 29. There is no reason why state law would govern the question whether lands held in trust by the United States for a Tribe or individual Indians may be taken by inverse condemnation. Although the statute at issue in *Clarke*, 25 U.S.C. 357, permits condemnation of allotted lands under state law, this Court held that Section 357 does not authorize "inverse condemnation" of such lands. Petitioner offers no reason why that statutory holding should be reconsidered. Petitioner also argues (Pet. 28-29 & n.7) that this Court should make an exception to the *Clarke* rule for cases like this. Even if the equities of petitioner's claim justified such an exception, however, there is no basis in the language of Section 357 to make exceptions to the *Clarke* rule based on the equities of particular cases.

Power Act (FPA), 16 U.S.C. 797(e), to permit the project to go forward. Under Section 4(e), a license may not permit the use of lands on a federal reservation unless the Commission finds that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired," and the license must contain "such conditions as the Secretary [of the Interior] shall deem necessary for the adequate protection and utilization of such reservation[]." 16 U.S.C. 797(e). See generally *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765 (1984).

Article 33 cannot be construed to have permitted the project to flood the Kalispel lands at issue here under Section 4(e), because the FPC was not informed that the project would have that effect. Petitioner's license application indicated that the effects of the dam would be limited to the area 24 miles upstream from the dam; the Kalispel Reservation is 30 miles upstream from the dam. See Pet. App. 10a-11a, 58a-59a. Thus, the FPC's general finding that "[t]he issuance of license for the project * * * will not interfere or be inconsistent with the purposes of any withdrawal of public lands," *id.* at 61a, cannot be taken to be a Section 4(e) finding that the flooding of the Kalispel lands would be consistent with the purposes for which the Kalispel Reservation was created. Nor, for the same reason, could the Acting Secretary of the Interior's recommendation that Article 33 be included in the license constitute a Section 4(e) specification of conditions "necessary for the adequate protection and utilization of [the Kalispel] reservation[]." 16 U.S.C. 797(e).

Finally, interpreting Article 33 to have granted petitioner permission to flood Indian lands would require a finding that the FPC and the Secretary of the Interior had disregarded their duties under Section 10(e)(1) of the

FPA, 16 U.S.C. 803(e)(1) (1988 & Supp. V 1993). Under that provision, a licensee may not use tribal lands within a reservation unless the Commission fixes a "reasonable annual charge[]" for use of the lands and the Tribe approves that charge. In this case, the Commission did not fix any specific charge for flooding under Section 10(e)(1), and the Tribe did not approve any such charge.

Petitioner nevertheless contends that the court of appeals erred in construing its license. Petitioner contends (Pet. 15-18) that it fully informed the Commission about the effect of its project on the Indian lands, that the Secretary of the Interior proposed conditions to ameliorate that effect when he proposed the inclusion of what became Article 33 in petitioner's license, and that, since no tribal lands were affected, Section 10(e)(1) has no bearing on this case. For the reasons given above, we believe that the court of appeals correctly rejected petitioner's arguments. In any event, the language of Article 33 alone is sufficient to support the court of appeals' interpretation. Although petitioner proffers an alternative explanation of Article 33 and most of the surrounding documents in this case, further review would be unwarranted to resolve the narrow and fact-bound question whether the court of appeals erred in rejecting that explanation.

2. Petitioner also contends (Pet. 20) that the court of appeals had no jurisdiction over this case, because it involved review of an order issued by the FPC and "Congress neither granted the appellate court nor the district court jurisdiction to review or overrule orders entered by the Federal Power Commission under the Federal Power Act thirty to forty years after those orders were entered." Pet. 20.

Initially, it should be noted that petitioner argued below that the court of appeals *should* determine the

scope of its license. Petitioner's opening brief argued that "it would have been a simple matter for the District Court to issue a Declaratory Judgment concerning [petitioner's] legal rights under its license," that "[t]he record is clear and complete and fully supports the remedy requested by [petitioner]," and that the court of appeals "can grant such remedy based upon the record before the District Court." Pet'r C.A. Br. 65. Petitioner added that "[t]he refusal of the District Court to provide such a remedy was an abusive [*sic*] discretion because it did not provide full and complete adjudication of the issues." *Ibid.*

In any event, this case did not involve judicial review of an FPC order. Instead, it was an action for trespass, brought by the United States on behalf of the Kalispel Indian Tribe and individual Indian allottees. Although the court of appeals discussed petitioner's license in the course of rejecting its defense, the court neither attempted to nor did exercise the authority granted by 16 U.S.C. 825*l*(b) to "affirm, modify, or set aside [an order of the Commission] in whole or in part." Accordingly, the court of appeals properly exercised jurisdiction over this case.

Petitioner's theory appears to be that petitioner could divest the federal courts of jurisdiction over this case by interposing as a defense a claim that a federal license permitted the trespass. None of the cases cited by petitioner (Pet. 20) supports that theory. In *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the FPC granted a license to a city that included the right to exercise eminent domain powers. The State was a party to the FPC proceedings and to the subsequent action in the court of appeals for judicial review of that decision. This Court held that the final judgment of the court of appeals in that action precluded later litigation among

the same parties over the same issue. 357 U.S. at 341. Since the United States, as trustee for the Indian lands at issue in this case, did not challenge the validity of any provision of petitioner's license and was not a party to any previous judicial proceeding involving petitioner's license, the decision in *Tacoma* has no bearing on the issues in this case.

In *DiLaura* v. *Power Authority*, 982 F.2d 73, 79 (2d Cir. 1992), the plaintiffs brought a claim for injunctive relief under the FPA without exhausting their administrative remedies before the Commission. The court of appeals held that it should therefore be dismissed. In *California Save Our Streams Council, Inc.* v. *Yeutter*, 887 F.2d 908, 911-912 (9th Cir. 1989), the plaintiffs sued the Forest Service, complaining about the procedures it had followed in recommending to the Commission that it impose certain conditions on a license under Section 4(e) of the Act, 16 U.S.C. 797(e). The court of appeals noted that the claim was in fact "an attempt to restrain the licensing procedures authorized by FERC," 887 F.2d at 912, and ordered the case dismissed. Because the claim in this case did not arise under the FPA and did not attempt to attack any procedural or substantive decision made by the Commission under the FPA, neither decision is of assistance to petitioner in this case.

3. Petitioner also asserts (Pet. i) that this case presents the question "[w]hether the United States Court of Appeals ha[s] the judicial power to reverse and overrule Findings of Fact entered by the district court which are supported by substantial evidence where there is no evidence or record to support the decision of the Court of Appeals." Petitioner does not specify which district court factual findings were improperly reversed or overruled. Although the court of appeals disagreed

with petitioner concerning the meaning of Article 33 of its license, the court's decision was not based on any factual disagreement with the district court. In any event, further review would not be warranted to determine whether the court of appeals misapprehended the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

ROBERT L. KLARQUIST
ELIZABETH ANN PETERSON
Attorneys

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